

Attorney Docket: RMI-5723 CON2
(formerly 271/094)

REMARKS

Claims 1-3 and 6-12 remain pending in this case. Claim 11 remains withdrawn. Claim 8 has been amended. Reconsideration of the rejections set forth in the Office Action mailed September 2, 2005, is respectfully requested.

Claim 8 was rejected under 35 U.S.C. 112 as being indefinite. Applicant has amended Claim 8 to depend now depend from Claim 3 which provides the proper antecedent basis to place Claim 8 in condition for allowance. Accordingly, Applicant requests that the rejection of Claim 8 be withdrawn.

Art Rejections

Claims 1-3, 6-10, and 12 were rejected under 35 U.S.C. § 103(a) as being allegedly unpatentable over Tsugita (USPN 5,911,734) in view of Barbut (USPN 5,662,671). Claim 3 was rejected under 35 U.S.C. § 103(a) as being allegedly unpatentable over Tsugita in view of Barbut and further in view of Bajaj (USPN 5,053,008). Claim 9 was rejected under 35 U.S.C. § 103(a) as being allegedly unpatentable over Tsugita in view of Kletschka (USPN 4,794,928). The rejections are overcome as follows.

Applicant respectfully requests that the Tsugita reference be disqualified as prior art under 35 U.S.C. 103(c). The present application and the Tsugita patent (USPN 5,911,734) were, at the time the invention of the present application was made, owned by Embol-X, Inc.

As the Examiner has noted the Tsugita reference can only constitute prior art under 35 U.S.C. 102(e). Thus, since the Tsugita reference is used as a 35 U.S.C. 103(a) reference, the Tsugita patent must be disqualified as prior art. (MPEP 706.02(I)(1) and 706.02(I)(2))

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Accordingly, independent Claim 1 is allowable. Claims 2, 3, 6-10 and 12 depend from Claim 1 and are therefore allowable for at least the same reasons as Claim 1.

FEES DUE TO FILE THIS AMENDMENT

The aforementioned claim additions and/or cancellations have not resulted in more than the original number of claims, and **thus no claim fees are believed to be due** to file this amendment.

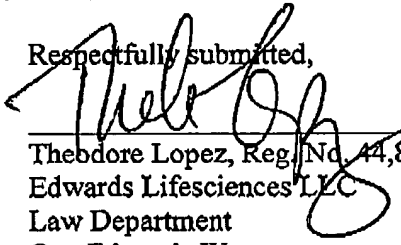
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CONCLUSION

For the above reasons, pending Claims 1-3, 6-10 and 12 are in condition for allowance and allowance of the application is hereby solicited. If the Examiner has any questions or concerns, a telephone call to the undersigned at 949-250-6856 is welcomed and encouraged.

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Respectfully submitted,


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